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No. 94-262

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

HUGHES AIRCRAFT COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Aerospace Industries Association of America, Inc. ("AIA") is the national trade association representing the manufacturers of aerospace equipment. The defense contractors who are members of AIA derive a substantial part of their business from prime contracts with the United States or subcontracts received from prime contractors and are thus subject to the False Claims Act and to U.S. Government debarment procedures.

The views in this brief reflect the importance of the intracorporate conspiracy doctrine to American corporations,

and especially to those corporations that do substantial business with the government.

Pursuant to Supreme Court Rule 37.2, we have obtained the consent of all parties in this action to file this brief in support of the petitioner. Letters of consent are on file with the Clerk of this Court.

ARGUMENT

I

THE INTRACORPORATE CONSPIRACY DOCTRINE PROTECTS CORPORATIONS FROM UNDESERVED CRIMINAL LIABILITY

The decision below permits the conviction of a corporation for conspiracy even when *all* of the alleged conspirators are employees and agents of the same corporation. A corporation, according to that ruling, can conspire criminally with itself. Not only is that ruling facially illogical, it extends the criminal liability of corporations beyond that of natural persons since natural persons, of course, cannot conspire with themselves.

The lower court, in both its reasoning and its result, rejects the common law intracorporate conspiracy doctrine, which precludes imputation of conspiracy liability to corporations solely on the basis of intracorporate activity. The application of this doctrine to federal civil and criminal conspiracy statutes is a disputed question in the federal courts (*see* Hughes Cert. Pet. at pp. 10-16), which members of this Court have already recognized should be clarified. *See Hull v. Shuck*, 111 S. Ct. 2917 (1991) (White, J. and Marshall, J.,

dissenting from the denial of certiorari) (noting conflict among the circuits regarding use of intracorporate conspiracy rule in civil rights cases).

The Hughes petition for certiorari demonstrates that the decision below is incompatible with straightforward principles of statutory construction. The lower court, rather than reconciling its reasoning with the plain language of the statute, preferred to rest its result on the completely inaccurate premise that application of "the intracorporate conspiracy doctrine to this case [would mean] no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." Pet. at 8a-9a. This is simply wrong: application of the intracorporate conspiracy doctrine to a case where the sole participants in the conspiracy are employees of the same corporation only means that a corporation cannot be convicted of conspiring with itself. Where corporations, through their employees, conspire with others, they remain just as liable for the crime of criminal conspiracy as other defendants.

The ruling below effectively undermines the very basis for criminalizing conspiracies in the first place. As stated in *United States v. Rabinowich*, 238 U.S. 78, 88 (1915):

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring

> more time for its discovery, and adding to the importance of punishing it when discovered.

The *Rabinowich* case states the traditional rationale for independent criminal liability based on conspiratorial behavior: when two individuals or separate corporate entities combine for the deliberate purpose of committing a crime against the state, the very act of combination is both a departure from normal behavior and a special threat to the stability of the community. That social threat, recognized by the traditional law of criminal conspiracy, is a far cry from the circumstance that may arise in any large corporation when an individual engages in and discusses a particular act of malfeasance with co-workers or supervisors. Corporations, by their very nature, are cooperative group enterprises, dependent upon hierarchical structures and multiple layers of reporting for all internal activity. Under the ruling below, as a practical matter, every individual act of malfeasance in a corporation can be converted by a prosecutor into a "corporate conspiracy" simply by virtue of the recording and reporting of the activity within the corporate structure -- even if an official high up in the corporation stops the inchoate malfeasance before any substantive crime is committed.

Similar concerns, in part, caused courts to hesitate before finally eliminating the ancient rule that husbands and wives could not be convicted of conspiracy with each other. As Chief Justice Warren explained, "A wife, simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him, but which might be far removed from the arm's-length agreement typical of that crime." *United States v. Dege*, 364 U.S. 51, 57 (1960) (dissenting opinion). The *Dege* Court held that husband-wife conspiracies were punishable under 18 U.S.C. § 371 because

the common law notion that a married couple is really only one person had long since been rejected as archaic. *See Dege*, 364 U.S. at 53-54. Chief Justice Warren's dissenting concerns apply equally strongly here -- corporate employees are necessarily engaged in group endeavors -- but there has been no corresponding departure from the common law. A corporation is still one person in the eyes of the law, *see* 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 4884 at 361 (Zajdel ed. 1986), and thus it cannot be liable for conspiring with itself.

The ease by which the government may prove an intracorporate "conspiracy" makes this problem all the more severe. To win a conviction under 18 U.S.C. § 371, the government need not prove an explicit agreement to defraud the United States. Indeed, by far the more common approach is to establish an agreement by asking the jury to infer one from the circumstances of the case, *see, e.g., United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1357 (1993); *United States v. Restrepo*, 930 F.2d 705 (9th Cir. 1991), *United States v. Ivey*, 915 F.2d 380 (8th Cir. 1990), and the agreement that is "proven" may well be an implicit one.[1] *See, e.g., United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991). Conspiracies are typically proven by circumstantial evidence -- that two co-conspirators met at a certain time or place or that they communicated in some way.

Given these rules of proof, it is extraordinarily easy to "establish" an intracorporate conspiracy. The mere recording

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[1] Thus, although jury instructions use the term "agreement," such agreements need not be articulated at all but rather may be implicit in a working relationship between the parties. *See, e.g., United States v. Moran*, 984 F.2d 1299 (1st Cir. 1993).

and reporting of any particular individual employee's act of malfeasance through the normal course of intracorporate memos and meetings becomes evidence of "agreement" supporting a charge of "criminal conspiracy." The practical result is that the corporation ends up being charged for criminal conspiracy where the real "criminal" conduct was a unilateral act of employee malfeasance.

As far back as 1946, this Court recognized the danger inherent in overly harsh doctrines of criminal conspiracy law. In *Pinkerton v. United States*, 328 U.S. 640, 644 n.4 (1946), this Court warned that "the addition of a conspiracy count may at times be abusive and unjust."[2] It quoted the Report of the Conference of Senior Circuit Judges in 1925:

> Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which

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2 In *Pinkerton v. United States*, 328 U.S. 640 (1946), this Court held that where two brothers had conspired to commit substantive offenses, the conviction of both brothers on the substantive counts could stand even though one brother did not participate in any way in committing the substantive crimes.

Applying this doctrine to intracorporate agreements thus potentially subjects the corporation found guilty of conspiring with itself to liability for any substantive offense subsequently committed by an employee pursuant to that "conspiracy" -- even if that offense was not within scope of the employee's duties.

> do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.

Annual Report of the Attorney General for 1925, pp. 5-6 (quoted in *Pinkerton*, 328 U.S. at 644 n.4). Those fears are all the more severe when the government's advantages are combined with the Ninth Circuit's ruling below.[3]

II

THE RULING BELOW UNDERMINES RESPONSIBLE CORPORATIONS' EFFORTS TO COMPLY WITH THE LAW

Corporations, like AIA members, that do substantial business with the government make significant efforts to avoid criminal wrongdoing by implementing extensive compliance programs. Such responsible corporations also make every effort to promote to positions of authority only those people who deal ethically and honestly with the government. As a practical matter, the ruling below undermines those efforts.

Under the decision below, a corporation is criminally liable for conspiracy when two of its own employees agree to

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[3] In fact, the trial judge in the *Hughes* case stated that the conspiracy count (under which Hughes was convicted) was used by the government to introduce otherwise inadmissible evidence to "dirty the water." Tr. 3/2/92 at p. 35.

defraud the government and either employee commits any overt act in furtherance of that agreement. That liability is *not* eliminated even if the corporation's own internal compliance mechanism or a responsible corporate official discovers the problem and prevents the substantive fraud or crime from occurring.

Subjecting corporations to criminal liability for conspiracy in such circumstances is counterproductive and unfair to both the corporation's shareholders and its executives alike. The *corporation*, as an entity, has done everything it can reasonably be expected to do to prevent fraud. Virtually all major defense contractors, and all members of AIA, spend substantial sums of money each year on such compliance programs. In large defense contractors, such programs are elaborate, consisting of anonymous hotlines, separate internal audit divisions, training programs, published codes of conduct and so on. *See generally* J. Kaplan, J. Murphy & W. Swenson, *Compliance Programs and the Corporate Sentencing Guidelines* (1993). These compliance programs are expressly encouraged, as a matter of federal policy, by the Federal Sentencing Guidelines, *see Federal Sentencing Guidelines* § 8C2.5(f), by federal regulations, *see* 48 C.F.R. Ch. 2 § 252.203-7002 (mandatory hotlines), and by institutionalized voluntary disclosure programs such as the one administered by the Department of Defense. In large organizations, malfeasance can occur despite diligent efforts to prevent it. These compliance programs recognize that fact and seek to ensure that, despite any such problem, no false statements are actually made to the government and no other violations of law occur.

To subject the corporation to criminal liability -- notwithstanding the *successful* operation of its compliance programs -- makes a mockery of a responsible corporation's

attempts to obey the law while doing business with the government. Under the Ninth Circuit's ruling, even the best corporate compliance efforts can provide only illusory comfort to the corporation's shareholders: the corporation may well be convicted of internal "conspiracies," even if the corporation succeeds in preventing any substantive offenses.

III

THE RULING BELOW CREATES AN UNFAIR DANGER OF SUSPENSION OR DEBARMENT FROM GOVERNMENT CONTRACTING

Any corporation which deals with the federal government may be suspended or debarred from dealing with the government under established regulations if indicted or convicted of a crime. See 48 C.F.R. subpart 9.4 (1993). For many corporations that rely on government contracts, debarment is tantamount to a corporate death sentence.

The ruling below enables a prosecutor to convert virtually any unilateral employee malfeasance into a "corporate conspiracy" to enhance the possibility of a conviction and thus of suspension and debarment. Moreover, the ruling below gives prosecutors enormous leverage to extract unreasonable "settlement" agreements from corporations that rely on government business since the mere act of charging a criminal conspiracy may be disastrous for the contractor (and especially for the smaller contractor) who may be suspended merely by virtue of an indictment. Lest this seem unlikely, we note that the prosecutor below candidly informed the trial judge:

> One of the interests in obtaining a conviction is obtaining a conviction on a crime that might have an impact not only with the court but with suspension and debarment. They are far more interested in the conspiracy count because that says a lot more to them about the nature of this operation at least in 1986 and 1987 than a few isolated days in November or two hybrids out of thousands that were processed in December of 1986. The substantive counts simply do not send enough information for other purposes as well, and to be candid with you, that is one of our responsibilities is why we bring the conspiracy count.[4]

IV

THE "QUI TAM" PROVISIONS OF FEDERAL LAW ADD TO THE UNFAIRNESS OF THE DECISION BELOW

As large defense contractors, the members of AIA are well-acquainted with the False Claims Act, 31 U.S.C. § 3729, and expend considerable effort and money ensuring that no false claims are made to the government. The rule announced by the Ninth Circuit creates a perverse incentive for corporate employees to create intracorporate "conspiracies" -- which violate that act, *see* 31 U.S.C. § 3729(a)(3) -- and then to profit by their own violations through *qui tam* actions under 31 U.S.C. § 3730.

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[4] Tr. 3/18/92 at p. 29.

We acknowledge, of course, that the *qui tam* provisions of federal law are specifically designed to create an incentive for corporate employees to report wrongdoing by their companies. But the rule adopted by the Ninth Circuit below creates an enormous loophole, allowing would-be intracorporate "conspirators" to acquire the proverbial pot of gold from the corporation, even where, as here, no false statement is ultimately made to the government.[5] Suppose that a corporate employee brings a *qui tam* action based on his own "conspiracy" with a co-worker to defraud the government. Even if the corporation's compliance programs or a high-ranking corporate official successfully prevented any false claim from being made to the government, the company would, under the Ninth Circuit's rule, be liable under the False Claims Act, 31 U.S.C. § 3729(a)(3), for "conspir[ing] to defraud the Government." The *qui tam* plaintiff would be entitled to an award of up to 30% of the proceeds of the action, plus his or her attorneys' fees and costs.[6] This is true even though he or she was a participant in the wrongdoing. *See* 31 U.S.C. § 3730(d)(3).[7]

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[5] Indeed, in this very case, one of the unindicted "co-conspirators," Margaret Goodearl, is a *qui tam* plaintiff.

[6] Even if the Government suffered no loss, the corporation would still be liable under the False Claims Act, *see United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), and could be forced to pay substantial penalties, *see, e.g., United States v. Zan Mach. Co.*, 803 F. Supp. 620 (E.D.N.Y. 1992); *United States v. Fliegler*, 756 F. Supp. 688 (E.D.N.Y. 1990) (imposing $5,000 fine for each of 32 violations).

[7] If the action was brought by the person who planned or initiated the violation of § 3729, the court *may* reduce that person's share of the proceeds. Any person convicted of a crime involving the § 3729 complaint is barred from collecting the proceeds.

CONCLUSION

Because of the confusion in the law of conspiracy and the serious and unfair impact of the decision below on corporations, this Court should grant the petition for certiorari.

Respectfully submitted,

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